No. 96-631

(2)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

HOWARD G. JOHNSON, *Petitioner*

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA ET AL., *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

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JOINT BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the Ninth Circuit's Order dismissing Petitioner's action against Respondents on Younger abstention grounds raises an important federal question which should be decided by this Court?

(2) Whether Petitioner's vague and unsupported allegations of financial bias in California attorney disciplinary proceedings should bar Younger abstention?

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STATEMENT OF THE CASE

Petitioner, Howard G. Johnson, is an attorney who, while undergoing disciplinary proceedings in the State Bar Court of the State Bar of California, filed a civil rights action in the Central District of the United States District Court alleging violations of due process and equal protection. Petitioner claimed, inter alia, that the California State Bar Court was unconstitutional as a "partisan" court and that its judges and the Justices of the California Supreme Court were financially interested in the outcome of disciplinary proceedings.

This action was similar to many other lawsuits filed in the Southern, Eastern and Central Districts, all of which were dismissed, and four of which were consolidated and dismissed in the case of Hirsh v. Justices of the Supreme Court, 67 F.3d 708 (9th Cir. 1995).

Petitioner seeks a writ of certiorari to review the Ninth Circuit's Order, filed May 6, 1996, which affirmed the dismissal of his action by the Central District Court on the grounds that Hirsh was dispositive of all bias issues raised by Petitioner.

Petitioner first argues that a writ of review should be granted because the Senior Judge of the Ninth Circuit, Arthur Alarcon, served on a task force (the "Discipline Evaluation Committee") which evaluated the disciplinary process of the State Bar of California. (Petition, pp.6-8.) Petitioner alleges in conclusory and speculative terms that Judge Alarcon's participation in the task force tainted all proceedings in the Ninth Circuit against him.[1] (Petition pp.6-8.)

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[1] Petitioner has introduced media clippings, which he has reprinted, regarding Judge Alarcon's participation on the State Bar of California's

Petitioner, however, fails to inform the Court that Judge Alarcon did not sit on the panel of judges which reviewed and ultimately affirmed the District Court's dismissal of Petitioner's action (Petition, Appendix A, p. 1(a)).

Petitioner next argues that, due to the "partisan" nature of the California Supreme Court and the presence of financial bias inherent to California's disciplinary system, sufficient bias to overcome Younger abstention has been established. (Younger v. Harris, 401 U.S. 37 (1971).) (Petition, pp.9-11.)

A. The Nature of the California Attorney Disciplinary System

The State Bar is a public corporation established in the judicial

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Discipline Evaluation Committee. (Petition, Appendix D, pp. 20(a)-58(a).) These materials were not made part of the record below. Respondents object to Petitioner's attempt to expand the record.

branch of government for the purpose of performing governmental functions in the administration of justice. (Cal. Const., art. VI, §9; Cal. Bus. & Prof. Code § 6001.) In matters of admissions and discipline of attorneys, the State Bar acts as an administrative arm of the California Supreme Court. (Rosenthal v. Justices of the Supreme Court, 910 F.2d 571, 566 (9th Cir. 1990); Saleeby v. State Bar, 39 Cal.3d 547, 557, 216 Cal. Rptr. 367 (1985).)

Although the State Bar, as the Court's administrative arm, has statutory authority to conduct disciplinary proceedings under California's State Bar Act, Cal. Bus. & Prof. Code §§ 6000, et. seq., the California Supreme Court retains inherent power to control all matters related to attorney discipline. (Jacobs v. State Bar, 20 Cal.3d 191, 196, 141 Cal. Rptr. 812 (1977).) "Final

authority for disbarment [and other forms of discipline] rests not with the bar but with the state Supreme Court." (Rosenthal, supra, 910 F.2d at 566-67.)

The State Bar Court, which independently determines matters of attorney discipline, includes a Hearing Department, which conducts formal trial proceedings, and a Review Department, which functions as an appellate body to independently review determinations of the Hearing Department on a de novo basis. (Rules of Proc. of State Bar, rules 2.17 and 2.27.) While the review of State Bar proceedings by the California Supreme Court is discretionary, Cal. Rules of Ct. rule 954(a), all actions of the State Bar Court regarding attorney discipline are subject to the independent and plenary review of the California Supreme Court.

(Cal. Bus. & Prof. Code §§ 6082, 6083, 6087.)

B. **Statement of Facts and Procedural History**

Formal disciplinary proceedings were commenced against Petitioner with the filing of a Notice to Show Cause in State Bar Court on July 29, 1994. Petitioner was charged with four counts of ethical misconduct stemming from his representation of four separate clients. Petitioner represented himself pro se. Ultimately, two counts were dismissed with prejudice.

In one of the remaining counts, Petitioner was alleged to have failed to communicate with his client and incompetently performed legal services by allowing the statute of limitations to expire before filing a lawsuit on behalf of a client. Petitioner also failed to promptly refund unearned fees advanced to

him by this client despite a judgment of the small claims court against him.

In a separate and related count, Petitioner was alleged to have failed to communicate with another client and failed to perform legal services competently by filing an answer in propia persona though he was hired to personally defend this client. Petitioner also failed to appear at the client's hearing which resulted in a judgment against the client. In addition, Petitioner failed to promptly refund the unearned legal fees to this client.

On August 23, 1994, Petitioner filed a motion to dismiss in State Bar Court alleging, inter alia, that the State Bar Court was unconstitutional. This motion was denied on September 13, 1994. Petitioner sought review of the dismissal in the California Supreme Court, which petition for review was denied by the

California Supreme Court by Order filed on December 14, 1994.

Petitioner then moved to recuse the Hearing Judge assigned to hear his case as well as all other State Bar Court judges alleging conflicts of interests. Petitioner's motion was denied by the State Bar Court on February 27, 1995.

Petitioner next filed in the Review Department of the State Bar Court a petition to refer his disciplinary matter to a state court alleging that the State Bar Court was unconstitutional. The Review Department of the State Bar Court denied his petition on July 6, 1995. This order was later vacated and replaced by a new order of denial on other grounds, filed October 13, 1995.

Petitioner filed a second petition for review in the California Supreme

Court on or about July 1995.[2] On or about August 1995, Petitioner filed a motion to recuse the Justices of the California Supreme Court.

The hearing in Petitioner's disciplinary action was held on October 30, 31, and November 1, 1995. Petitioner appeared pro se and when called to the stand, refused to testify alleging the Fifth Amendment privilege.

On November 1, 1995, the Hearing Judge tentatively found culpability on the two remaining counts of the formal charges and the matter was submitted for formal recommendation.

A few days prior to the commencement of Petitioner's disciplinary hearing (October 27, 1995), Petitioner filed in

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[2] At the time of the filing of Respondent State Bar's Motion to Dismiss in this matter, November 20, 1995, the California Supreme Court had yet to rule on Petitioner's second petition for review.

the Central District a civil rights complaint for damages and injunctive relief against the State Bar trial counsel assigned to prosecute the disciplinary action against him and the Hearing Judge who was presiding over the disciplinary proceedings as well as the State Bar Court and the State Bar of California ("Respondent State Bar"). Petitioner also named as party defendants the Justices of the California Supreme Court.

On November 20, 1995, Respondent State Bar filed a motion to dismiss which was joined by the California Attorney General on behalf of the Justices of the California Supreme Court. Petitioner filed an opposition. On January 31, 1996, The Honorable David Kenyon, United States District Judge for the Central District, granted the joint motion of Respondents the State Bar and the

California Attorney General on Younger abstention grounds.

Petitioner filed a notice of appeal on February 6, 1996. The Ninth Circuit, relying on the holding in Hirsh v. Justices of the Supreme Court, supra, 67 F.3d 708, affirmed the District Court's dismissal of Petitioner's complaint by Order filed on May 6, 1996. The Ninth Circuit noted that Hirsh "address[ed] and reject[ed] each of appellant's allegations relating to bias on the part of the California State Bar Court." (Id.)

Petitioner now seeks a writ of certiorari to review the Ninth Circuit's Order affirming the dismissal of his action by the Central District.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit's Affirmance of the Central District's Dismissal of Petitioner's Action Does Not Raise Important Federal Questions

Review of a writ of certiorari is not a matter of right and will be granted only where there are special and important reasons. Rule 10, Rules of the Supreme Court of the United States. None of the applicable reasons set forth in Rule 10 are available here. The Ninth Circuit's Order affirming the Central District's dismissal of Petitioner's lawsuit does not conflict with that of any other state court of last resort or of a federal appeals court (rule 10(b)); and the Ninth Circuit decision at issue does not decide an important federal question of federal law that should be decided by this Court, nor is it in conflict with any decision of the Court

(rule 10(c)). Moreover, Petitioner's claims are fact dependent and of no consequence for other litigants.

B. **Petitioner's Claims Regarding Conflicts of Interest And Financial Bias of Respondents And the Senior Circuit Judge For the Ninth Circuit In Attorney Disciplinary Matters Are Speculative And Groundless**

Petitioner contends that the California Supreme Court is biased in favor of the State Bar, and that it cannot carry out, in a disinterested manner, its adjudicative role in reviewing and making final determinations with respect to the discipline of attorneys in the State of California. (Petition, pp. 8-9.) In support of these contentions, Petitioner argues that the California Supreme Court's role in appointing State Bar Court judges and awarding costs to the State Bar are in

conflict with its adjudicative role. (Petition, pp. 8-10 & fn. 1.) Petitioner cites this Court's decision in Aetna Life Insurance Co. v. LaVoie, 475 U.S. 813 (1986), for the proposition that, his due process rights have been violated based upon his speculative allegations of bias. Petitioner's reliance on Aetna to support his argument is unavailing because of the complete absence of any demonstration of bias by the California Supreme Court in favor of the State Bar or the State Bar Court. (Aetna, supra, 475 U.S. at 822 [bias is demonstrated only by evidence of a "direct, personal, substantial, pecuniary interest" in the outcome of a particular proceeding].)

Petitioner also asserts that Ninth Circuit Senior Judge Arthur Alarcon's participation on a task force designated to review California's discipline system violated his due process rights.

Petitioner has failed to inform this Court of the fact that Judge Alarcon did not participate on the panel of judges who presided over Petitioner's action. (Petition Appendix A, p. 1(a).) Again Petitioner presented no direct or substantial evidence to support his baseless allegations against Senior Judge Alarcon. (Aetna, supra, 475 U.S. at 822.)

Petitioner's claims were addressed in the nearly identical case of Hirsh v. Justices of the Supreme Court of California, 67 F.3d 708 (9th Cir. 1995). The Hirsh plaintiffs, as does Petitioner herein, alleged that the State Bar disciplinary system was unconstitutionally tainted by bias thereby depriving them of due process and equal protection. The Ninth Circuit held, however, that Younger abstention was required and that no bias on the part of the Justices of the California Supreme

Court or State Bar Court judges existed.[3]

Similarly, Petitioner seeks to establish a bias exception to Younger abstention by claiming that California's disciplinary system is biased because of financial interests in the outcome of proceedings in the California Supreme Court. While abstention is "inappropriate in the 'extraordinary circumstance' that the state tribunal is incompetent by reason of bias" (Hirsh, supra, 67 F.3d at 713 (citing Gibson v. Berryhill, 411 U.S. 564 (1973)), when one alleges bias, a strong presumption of honesty and integrity must be overcome. Hirsh, supra, 67 F.3d at 713 (citing

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[3] Petitioner tries vainly to distinguish Hirsh from his own action. As stated by the Central District Court of California, "these variations . . . are merely distinctions without differences." (Petition Appendix E, p. 64(a).)

Kenneally v. Lungren, 967 F.2d 329, 333 (9th Cir. 1992)). The Ninth Circuit Court in Hirsh held that the appellants, alleging the nearly identical unsupported and conclusory bias contentions now claimed by Petitioner, had failed to overcome this presumption of impartial and unbiased adjudicators. For the same reasons set forth in Hirsh, Younger abstention directly applies to the similar allegations of bias asserted by Petitioner.

CONCLUSION

Petitioner has failed to present any facts to support his request for a writ of certiorari, nor has he demonstrated that any of the actions taken by Respondents in connection with his case were improper. For these and all of the foregoing reasons, Respondents the State Bar and the Justices of the Supreme Court of California respectfully request this

Court to deny the petition for writ of certiorari.

DATED: November 19, 1996

Respectfully submitted,

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